

## Business Associate Agreement

This Business Associate Agreement ("Agreement") is made effective the ("Agreement Effective Date"), by and between (provider organization authorized representative), with offices at (provider address), hereinafter referred to as "Covered Entity", and Advocare LLC, with offices at 9800 Connecticut Drive, Crown Point, IN 46307 hereinafter referred to as "Business Associate", (individually, a "Party" and collectively, the "Parties").

### WITNESSETH

**WHEREAS**, Sections 261 through 264 of the federal Health Insurance Portability and Accountability Act ("HIPAA") of 1996, Public Law 104-191, known as "the Administrative Simplification provisions," direct the Department of Health and Human Services ("HHS") to develop standards to protect the security, confidentiality and integrity of health information; and

**WHEREAS**, pursuant to the Administrative Simplification provisions, the Secretary of HHS issued regulations modifying 45 CFR Parts 160 and 164 (the "HIPAA Security and Privacy Rule"); and

**WHEREAS**, the American Recovery and Reinvestment Act ("ARRA") of 2009 (Pub. L. 111-5), pursuant to Title XIII of Division A and Title IV of Division B, called the "Health Information Technology for Economic and Clinical Health" ("HITECH") Act, provides modifications to the HIPAA Security and Privacy Rule (hereinafter, all references to the "HIPAA Security and Privacy Rule" are deemed to include all amendments to such rule contained in the HITECH Act and any accompanying regulations, and any other subsequently adopted amendments or regulations); and

**WHEREAS**, the HIPAA Omnibus Final Rule has been implemented (hereinafter, all references to the "HIPAA Security and Privacy Rule" are deemed to include all amendments to such rule contained in the HITECH Act and any accompanying regulations, the Omnibus Final Rule and any other subsequently adopted amendments or regulations); and

**WHEREAS**, the Parties wish to enter into or have entered into an arrangement whereby Business Associate will provide certain services to Covered Entity, and, pursuant to such arrangement, Business Associate may be considered a "business associate" of Covered Entity as defined in the HIPAA Security and Privacy Rule (use of the uAdvocare.com system being the evidence of such arrangement by virtue of the fact that Users must agree to uAdvocare's Terms & Conditions whenever logging into the system - hereby referred to as the "Arrangement Agreement"); and

**WHEREAS**, Business Associate may have access to Protected Health Information ("PHI"), as defined below, in fulfilling its responsibilities under such arrangement; and

**THEREFORE**, in consideration of the Parties' continuing obligations under the Arrangement Agreement, compliance with the HIPAA Security and Privacy Rule, and for other good and valuable consideration,

the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound, the Parties agree to the provisions of this Agreement in order to address the requirements of the HIPAA Security and Privacy Rule and to protect the interests of both Parties.

## **1. DEFINITIONS**

**1.1** Except as otherwise defined herein, any and all capitalized terms in this Section shall have the definitions set forth in the HIPAA Security and Privacy Rule. In the event of an inconsistency between the provisions of this Agreement and mandatory provisions of the HIPAA Security and Privacy Rule, as amended, the HIPAA Security and Privacy Rule shall control. Where provisions of this Agreement are different than those mandated in the HIPAA Security and Privacy Rule, but are nonetheless permitted by the HIPAA Security and Privacy Rule, the provisions of this Agreement shall control.

**1.2** The term "Protected Health Information" ("PHI") means individually identifiable health information including, without limitation, all information, data, documentation, and materials, including without limitation, demographic, medical and financial information, that relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and that identifies the individual or with respect to which there is a reasonable basis to believe the information can be used to identify the individual. "PHI" includes without limitation "Electronic Protected Health Information" ("E PHI") as defined below.

**1.3** The term "E PHI" means PHI which is transmitted by Electronic Media (as defined in the HIPAA Security and Privacy Rule) or maintained in Electronic Media.

**1.4** Business Associate acknowledges and agrees that all PHI that is created or received by Covered Entity and disclosed or made available in any form, including paper record, oral communication, audio recording, and electronic display by Covered Entity or its operating units to Business Associate or is created or received by Business Associate on Covered Entity's behalf shall be subject to this Agreement.

## **2. CONFIDENTIALITY AND SECURITY REQUIREMENTS**

**2.1** Business Associate agrees to the following obligations.

**2.1.1** Use or Disclosure of PHI: Business Associate agrees to use or disclose any PHI solely: (i) for meeting its obligations as set forth in any agreements between the Parties evidencing their business relationship, for services as described in such agreement(s), or (ii) as required by applicable law, rule or regulation, or by accrediting or credentialing organization to whom Covered Entity is required to disclose such information or as otherwise permitted under this Agreement, the Arrangement Agreement (if consistent with this Agreement and the HIPAA Security and Privacy Rule), or the HIPAA Security and Privacy Rule, and (iii) as would be permitted by the HIPAA Security and Privacy Rule if such use or disclosure were made by Covered Entity. All such uses and disclosures shall be subject to the

limits set forth in 45 CFR § 164.514 regarding limited data sets and 45 CFR § 164.502(b) regarding the minimum necessary requirements.

**2.1.2 Disposition of PHI.** Upon termination of this Agreement, the Arrangement Agreement (or any similar documentation of the business relationship of the Parties), or upon request of Covered Entity, whichever occurs first, if feasible, Business Associate will return or destroy all PHI received from or created or received by Business Associate on behalf of Covered Entity that Business Associate still maintains in any form and retain no copies of such information. It may not be feasible for Business Associate to return or destroy all copies of customer data constituting PHI. In such cases, where such return or destruction is not feasible, Business Associate will extend the protections of this Agreement to the information, will limit further uses and disclosures solely to those purposes as originally intended under this Agreement and will continue to use appropriate safeguards and comply with Subpart C of 45 CFR Part 164 with respect to EPHI to prevent use or disclosure of the PHI, for as long as Business Associate retains the PHI. The obligations of Business Associate under this Section shall survive the termination of this Agreement.

**2.1.3 Security of PHI.** Business Associate must review and modify security measures as needed to ensure the continued provision of reasonable and appropriate protection of EPHI. Business Associate further agrees to ensure that its agents, including subcontractors, to whom it provides PHI received from or created by Business Associate on behalf of Covered Entity, agrees to the same restrictions and conditions that apply to Business Associate with respect to such information, receives appropriate training, and agrees to implement reasonable and appropriate safeguards to protect any of such information which is EPHI. In addition, Business Associate agrees to take reasonable steps to ensure that its employees' actions or omissions do not cause Business Associate to breach the terms of this Agreement.

**2.1.4 Notification of Breach of PHI.** Business Associate shall, following the discovery of a breach of unsecured PHI, as defined in the HITECH Act or accompanying regulations, notify the covered entity of such breach pursuant to the terms of 45 CFR § 164.410 and cooperate in the Covered Entity's breach analysis procedures, including risk assessment, if requested. A breach shall be treated as discovered by Business Associate as of the first day on which such breach is known to Business Associate or, by exercising reasonable diligence, would have been known to Business Associate. Business Associate will provide such notification to Covered Entity without unreasonable delay and in no event later than twenty (20) calendar days after discovery of the breach. Such notification will contain the elements required in 45 CFR § 164.410.

**2.1.5 Breach of PHI by Covered Entity or by Customer/Owner of PHI.** In the event that a breach of unsecured PHI, as defined in the HITECH Act or accompanying regulations, occurs as a result of actions by Covered Entity or by the customer or owner of such PHI, and not by Business Associate, Business Associate will cooperate in the Covered Entity's breach analysis procedures, including risk assessment and determination of the extent of access of such unsecured PHI, at the written request of the Covered



Entity or customer/owner of such breached PHI, and for a fee consistent with Business Associate's then current rates.

**2.1.6 Compliance.** Business Associate will, pursuant to the HITECH Act and its implementing regulations, comply with all additional applicable requirements of the Privacy Rule, including those contained in 45 CFR §§ 164.502(e) and 164.504(e)(1)(ii), at such time as the requirements are applicable to Business Associate. Business Associate will not directly or indirectly receive remuneration in exchange for any PHI, subject to the exceptions contained in the HITECH Act, without a valid authorization from the applicable individual. Business Associate will not engage in any communication which might be deemed to be "marketing" under the HITECH Act. In addition, Business Associate will, pursuant to the HITECH Act and its implementing regulations, comply with all applicable requirements of the Security Rule, contained in 45 CFR §§ 164.308, 164.310, 164.312 and 164.316, at such time as the requirements are applicable to Business Associate.

**2.2 Permitted Use of PHI.** Notwithstanding the prohibitions set forth in this Agreement, Business Associate may use and disclose Protected Health Information:

**2.2.1** If necessary, for the proper management and administration of Business Associate services or to carry out the legal responsibilities of Business Associate, provided that as to any such disclosure, (i) the disclosure is required by law; or (ii) Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will be held confidentially and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person notifies Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached; or

**2.2.2** For data aggregation services, if to be provided by Business Associate for the health care operations of Covered Entity pursuant to any agreements between the Parties evidencing their business relationship, or as mutually agreed in writing by both Parties. For purposes of this Agreement, data aggregation services means the combining of PHI by Business Associate with the PHI received by Business Associate in its capacity as a business associate of another covered entity, to permit data analyses that relate to the health care operations of the respective covered entities.

**2.2.3** Notwithstanding the provisions of this Section 2.2, whether to the contrary or otherwise: (a) Business Associate may use or disclose PHI as required by law. (b) Business Associate agrees to make uses and disclosures and requests for PHI consistent with Covered Entity's minimum necessary policies and procedures. (c) Business Associate may not use or disclose PHI in a manner that would violate Subpart E of 45 CFR Part 164 if done by Covered Entity.

**2.3 Safeguarding PHI.** Business Associate will implement appropriate safeguards and comply with Subpart C of 45 CFR Part 164 with respect to electronic protected health information, to prevent use or disclosure of PHI other than as permitted in this Agreement. Business Associate will implement administrative, physical, and technical safeguards that reasonably and appropriately protect the



confidentiality, integrity, and availability of any EPHI that it creates, receives, maintains, or transmits on behalf of Covered Entity as required by the HIPAA Security and Privacy Rule.

**2.4 Audit of Business Associate's Records.** The Secretary of HHS shall have the right to audit Business Associate's records and practices related to use and disclosure of PHI to ensure Covered Entity's compliance with the terms of the HIPAA Security and Privacy Rule.

**2.5 Unauthorized Use of PHI.** Business Associate shall report to Covered Entity any use or disclosure of PHI which is not in compliance with the terms of this Agreement of which it becomes aware. Business Associate shall report to Covered Entity any Security Incident of which it becomes aware. For purposes of this Agreement, "Security Incident" means the attempted or successful unauthorized access, use, disclosure, modification, or destruction of information or interference with system operations in an information system. In addition, Business Associate agrees to mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement.

**2.6 Additional Requirements of Business Associate.** Notwithstanding any other provision of this Agreement, whether to the contrary or not, Business Associate must also: 1. Comply with the HIPAA Security Rule. 2. Report to Covered Entity any breach of unsecured PHI. 3. Enter into Business Associate Agreements with subcontractors imposing the same obligations that apply to the Business Associate. 4. Comply with the HIPAA Privacy Rule to the extent Business Associate is carrying out Covered Entity's Privacy Rule obligations. 5. If the Business Associate is aware of a pattern or practice of its subcontractors that would be a material breach of this Agreement, then it must take reasonable steps to end the violation or terminate the Agreement, if feasible. 6. Business Associate must conduct risk assessment and be more proactive and diligent to monitor new rules, regulations and guidance.

### **3. AVAILABILITY OF PHI**

**3.1 Restrictions on Disclosures of PHI.** Business Associate agrees to comply with any requests for restrictions on certain disclosures of PHI pursuant to Section 164.522 of the HIPAA Security and Privacy Rule to which Covered Entity has agreed and of which Business Associate is notified by Covered Entity.

**3.1.1** Such restrictions on disclosures of PHI include the following (to be completed by Covered Entity, if any. If none, state "None"): **ENUMERATE RESTRICTIONS (inserted by provider).**

None Currently. However, Business Associate agrees to comply with any future requests for restrictions under this provision when notified by Covered Entity in writing of such restrictions.

**3.2 Access.** Business Associate agrees to comply with any requests for access of PHI pursuant to Section 164.524 of the HIPAA Security and Privacy Rule to which Covered Entity has agreed and of which Business Associate is notified by Covered Entity, if any. Business Associate agrees to make available PHI to the extent and in the manner required by Section 164.524 of the HIPAA Security and Privacy Rule. If

Business Associate maintains PHI electronically, it agrees to make such PHI electronically available to the applicable individual, Business Associate agrees to make PHI available for amendment and incorporate any amendments to PHI in accordance with the requirements of Section 164.526 of the HIPAA Security and Privacy Rule.

**3.2.1** Such restrictions on access of PHI include the following (to be completed by Covered Entity, if any. If none, state "None"): **ENUMERATE RESTRICTIONS (inserted by provider)**.

**3.3** Accounting. In addition, Business Associate agrees to make PHI available for purposes of accounting of disclosures, as required by Section 164.528 of the HIPAA Security and Privacy Rule and Section 13405(c)(3) of the HITECH Act. Business Associate and Covered Entity shall cooperate in providing any accounting required on a timely basis.

#### **4. TERM AND TERMINATION**

**4.1** Term. This Agreement shall commence on the Business Associate Agreement Effective Date and shall continue until (i) either party terminates this Agreement in writing; or (ii) the owner of the customer data, or PHI, deletes all data from or otherwise terminates or ceases use of, or payment for, the products or services provided by Business Associate in connection with such PHI, in which case this Agreement will be deemed terminated.

**4.2** Termination for Cause. Notwithstanding anything in this Agreement to the contrary, Covered Entity shall have the right to terminate this Agreement and the Arrangement Agreement immediately if Covered Entity determines that Business Associate has violated any material term of this Agreement. If Covered Entity reasonably believes that Business Associate will violate a material term of this Agreement and, where practicable, Covered Entity gives written notice to Business Associate of such belief within a reasonable time after forming such belief, and Business Associate fails to provide adequate written assurances to Covered Entity that it will not breach the cited term of this Agreement within a reasonable period of time given the specific circumstances, but in any event, before the threatened breach is to occur, then Covered Entity shall have the right to terminate this Agreement and the Arrangement Agreement immediately.

#### **5. MISCELLANEOUS**

**5.1** No Third Parties; Survival. Except as expressly stated herein or within the HIPAA Security and Privacy Rule, the Parties to this Agreement do not intend to create any rights in any third parties. The obligations of Business Associate under this Section shall survive the expiration, termination, or cancellation of this Agreement, the Arrangement Agreement and/or the business relationship of the Parties, and shall continue to bind Business Associate, its agents, employees, contractors, successors, and assigns as set forth herein.

**5.2** Entire Agreement, Amendments, Assignment, Relationship, Waiver, Governing Law. This Agreement



is the entire agreement between the parties in connection with the subject matter herein and this Agreement may be amended or modified only in a writing signed by the Parties. Either party may assign, sublicense, delegate or transfer all or any portion of its rights or responsibilities under this Agreement by operation of law or otherwise to any subsidiaries or affiliates thereof, or to any other party, in connection with a sale of the business related to this Agreement or to the Arrangement Agreement. Any assignment of this Agreement by Business Associate in connection with a sale of this business shall relieve Business Associate from any further liability hereunder. None of the provisions of this Agreement are intended to create, nor will they be deemed to create any relationship between the Parties other than that of independent parties contracting with each other solely for the purposes of effecting the provisions of this Agreement and any other agreements between the Parties evidencing their business relationship. This Agreement will be governed by Indiana law, without regard to its choice of law provisions. No change, waiver or discharge of any liability or obligation hereunder on any one or more occasions shall be deemed a waiver of performance of any continuing or other obligation, or shall prohibit enforcement of any obligation, on any other occasion. In the event that any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the provisions of this Agreement will remain in full force and effect. In addition, in the event a Party believes in good faith that any provision of this Agreement fails to comply with the then-current requirements of the HIPAA Security and Privacy Rule, including any then-current requirements of the HITECH Act or its regulations, such Party shall notify the other Party in writing. For a period of up to thirty (30) days, the Parties shall address in good faith such concern and amend the terms of this Agreement, if necessary to bring it into compliance. If, after such thirty (30)-day period, the Agreement fails to comply with the HIPAA Security and Privacy Rule, including the HITECH Act, then either Party has the right to terminate upon written notice to the other Party.

**5.3 Minimum Requirements** The Parties agree that, in the event that any documentation of the Arrangement Agreement pursuant to which Business Associate provides services to Covered Entity contains provisions relating to the use or disclosure of Protected Health Information which are more restrictive than the provisions of this Agreement, the provisions of the more restrictive documentation will control. The provisions of this Agreement are intended to establish the minimum requirements regarding Business Associate's use and disclosure of Protected Health Information.

**5.4 Notices.** Except as otherwise specified herein, all notices, demands or communications required hereunder shall be in writing and delivered personally, or sent either by U.S. certified mail, postage prepaid return receipt requested, or by overnight delivery air courier (e.g., Federal Express) to the parties at their respective addresses set forth above in this Agreement. All such notices, requests, demands, or communications shall be deemed effective immediately upon receipt.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Business Associate Agreement Effective Date written above.

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